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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO: 1415/2024

Date Heard: 20 August 2024

Date Delivered: 03 September 2024

In the matter between:

ABSA BANK LIMITED **PLAINTIFF**

and

THEMBALIHLE CLAUBUS NTLONZE **DEFENDANT**

(Identity Number: 5[…])

JUDGMENT

MULLINS AJ

[1] Alleging that the Defendant was in breach of the terms of a credit agreement, in that he was in arrears with regard to the monthly repayments (in respect of a motor vehicle), the Plaintiff issued summons for:

(a) Cancellation of the contract;

(b) Return of the goods;

(c) Leave to prove damages (in due course);

(d) Costs as between attorney and client, (as provided for in the contract).

[2] The Defendant defended the action pleading:

(a) Supervening impossibility of performance;

(b) An incorrect calculation of the arrears;

(c) An intervening event of impossible performance.

[3] On receipt of the plea the Plaintiff applied for summary judgment, which is opposed by the Defendant (the "new" rule 32 being of application).

[4] In its affidavit the Plaintiff states:

(a) On his own version the Defendant is in arrears and is accordingly in breach;

(b) Between May 2020 to July 2020 the Defendant had been afforded a three month "holiday" when it became apparent that the so-called hard lockdown imposed during the height of the Covid-19 pandemic was not going to be lifted;

(c) Between August 2020 and December 2021 no payments were received;

(d) After the lockdown was officially lifted in April 2022 the Defendant had made only sporadic payments;

(e) The lockdown did not qualify as supervening impossibility of performance in that subjective difficulty in complying with the terms of a contract was no defence in law. Compliance with the terms of the contract had to be objectively impossible;

(f) The fact that the Defendant did not "intentionally, deliberately or wrongfully default" (as pleaded by the Defendant) was no defence in law;

(g) The contract is silent on the question of force majeure and therefore the common law applied;

(h) On his own version, if supervening impossibility of performance applied, the contract was terminated and the Defendant was obliged to return the vehicle, which he had failed to do.

[5] In his opposing affidavit the Defendant repeats, to a large extent, the contents of his plea. Thus:

(a) He alleges that the Covid-19 pandemic amounted to supervening impossibility of performance in that he was denied the opportunity of making a living;

(b) The Plaintiff had not adduced any evidence which confirmed his (the Defendant's) financial predicament;

(c) Despite the lockdown he had made substantial payments, which he details;

(d) He was not in wilful default of his obligations;

(e) The Plaintiff had failed to offer him a payment plan in respect of the arrears.

[6] The Defendant's case boils down to this: The vehicle was purchased to be used as a taxi. As the Covid-19 pandemic had prevented him from earning a living it

was not his fault that he fell into arrears and he was therefore not in breach of contract.

[7] In argument Mr *Marais*, who appeared for the Plaintiff, referred me to a number of judgments on the point, many of which deal with the economic hardship which was experienced as a result of the lockdown.

[8] In **Nedbank Ltd** v **Mathebula**[1] the facts are remarkably similar. The defendant financed the purchase of two vehicles which he intended to use as taxis. He fell into arrears and was in due course sued by the bank. His defence was that as a result of the national lockdown he was unable to ply his trade and that this amounted to supervening impossibility of performance which prevented him from complying with his contractual obligations and he was, therefore, not in breach.

[9] In a very helpful summary of the law on the point the learned judge rejected the defence and granted judgment for the plaintiff. Quoting **Freestone Property Investment (Pty) Ltd** v **Remake Consultants CC**[2] the following was stated (at para 22):

> "The declaration of the state of disaster and the continued effect of the Covid-19 pandemic may have resulted in a dramatic decline in custom but does not afford a defence."

[10] It is important to bear in mind that the test for supervening impossibility of performance is an objective test, not subjective one. To quote from **Freestone** again (at para 20):

> "The event may[3] also render performance absolutely or objectively impossible. The fact that *vis major* or *casus fortuitus* had made it uneconomical for a party to carry out its obligations, however, does not mean that performance has become impossible."

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1 [2024] ZAGPPHC 621
2 2021 (6) SA 470 (GC)
3 If I am not mistaken, the word "may" should read "must".

[11] An example of objective impossibility of performance is the total destruction of a building, which is the subject of a lease agreement, by fire. As the landlord is no longer able to provide the lessee with the building the lessee is excused from paying the rent. By operation of law the lease terminates.

[12] In the present matter the contract which the parties concluded was for the purchase by the Defendant of a motor vehicle in accordance with a credit agreement. The contract is silent on the purpose for which the vehicle was purchased. The fact that, due to circumstances completely beyond his control, the Defendant's taxi business became uneconomical is irrelevant. If this was the basis for supervening impossibility of performance it would open the floodgates, as it were. By way of example, (and persisting with the flood theme), if a bridge is washed away and the Defendant is no longer able to transport his passengers to the other side of the river, thereby severely affecting his income, would he be able to plead supervening impossibility of performance? Clearly not.

[13] Another judgment dealing with the economic effect of the hard lockdown is **Hennops_Sport (Pty) Ltd** v **Luhan Auto (Pty) Ltd.**[4] This involved the lease of premises in order for the lessee to operate a motor vehicle dealership. Understandably, the lockdown had a major impact on the dealership's profitability and it fell into arrears. When sued for arrear rental the lessee pleaded supervening impossibility of performance and was successful in the court *a quo*. On appeal it was held that the defence was not available. The court stated as follows (at para 9):

> "[9] The pith of this appeal and the legal question in it is whether supervening impossibility of performance occurred in respect of the lease agreement entered into between the appellant and the respondent. Laden in this appeal is also the question whether COVID-19 restrictions in terms of the regulations imposed by the Government during the relevant times constitutes supervening impossibility proper in respect of a lease agreement. In our view, the apt name for the doctrine of supervening impossibility is the doctrine of

[4] [2022] ZAGPPHC 953

> frustration. It is apt in our view because veritably, what happens or should happen is the frustration of the terms of the agreement of whatever nature as between the parties. The dictionary meaning of the word frustration is an act of hindering someone's plans or efforts. On the other hand, the word impossible when used as a noun, it means that something that cannot be done; and as an adjective, it means not capable of occurring or being accomplished or dealt with."

[14] In essence, what the court found was that there was nothing to prevent the performance of the contract. The premises remained available to the lessee, who remained in occupation. On the question of the financial implications of the lockdown the court had this to say (at para 22):

> "[22] Commercial impossibility does not give rise to the principle of supervening impossibility. A party cannot be discharged from performing a contract because it is non-profitable for that party. In due course, in this judgment, this Court shall revert to this issue when discussing the impact of COVID-19."

[15] Another difficulty facing the Defendant in the present matter is that his arrears are not confined to the limited period of the hard lockdown. Despite making some payments subsequent thereto he remains substantially in arrears. Admittedly the amount of the arrears is in dispute, but as the Plaintiff is not seeking a monetary judgment at this stage, this is of no moment.

[16] During his argument, Mr *Kwitshana*, for the Defendant, conceded that what the Defendant really wanted was a "payment plan".

[17] Finally, it is significant that at no stage, not even during argument before me, did the Defendant tender the return of the vehicle. It is axiomatic that, for the defence of supervening impossibility of performance to succeed, the vehicle would have to be returned to the Plaintiff. The failure to undertake to do so is fatal to the Defendant's case.

[18] In the circumstances I am satisfied that the Plaintiff has made out a case for summary judgment and make the following order:

(a) Confirmation of the cancellation of the agreement;

(b) Return of the **2019 TOYOTA QUANTUM 2.5 D-4D SESFIKILE 16S** with engine number **2[…]** and chassis number **A[…]**;

(c) Leave to prove damages;

(d) Costs on the scale as between attorney and client.

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NJ MULLINS

ACTING JUDGE IN THE HIGH COURT

DATE:

APPEARANCES: **Plaintiff:** Adv. Marias
MCWILLIAMS & ELLIOT INC
(Ref: M.Marais)
C/O HUXTABLE ATTORNEYS
(Ref: O. Huxtable)

Defendant: Adv. Kwitshana
T.MNYAKA & CO
(Ref: ZF/C/V/062)
C/O YOKWANA ATTORNEYS